

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ARGENT CHEMICAL  
LABORATORIES, INC.,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 06-028

ORDER GRANTING  
PARTIAL SUMMARY JUDGMENT

Argent Chemical Laboratories, Inc., (Argent Labs), filed an appeal with the Pollution Control Hearings Board (Board) on May 4, 2006. Argent Labs challenges the Department of Ecology's (Ecology) Notice of Penalty Incurred and Due (No. 2769) in the amount of \$180,000.00, as well as an Administrative Order (No. 2768) for alleged violations of dangerous waste laws.

Ecology filed a Motion for Partial Summary Judgment on Legal Issue No.3 in this case which is stated in the June 2, 2006, Pre-Hearing Order, as follows:

Whether the Board has jurisdiction to hear the appeal of Order No. 2768 where an appeal of Order No. 2768 was not filed with the Board within thirty days of Appellant's receipt of the Order.

John S. York represents Appellant Argent Labs. Andrea L. Clausen and Alexandra K. Smith, Assistant Attorneys General, represent Respondent Ecology. The Pollution Control Hearings Board (Board), comprised of William H. Lynch, presiding, Kathleen D. Mix, and

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1 Andrea McNamara Doyle, reviewed the materials pertinent to the motions in this case. Argent  
2 Labs filed a second response, dated August 3, 2006, which Ecology moved to strike. The  
3 Presiding Officer grants the motion to strike. Therefore, the second response and materials  
4 attached to that response were not considered by the Board.<sup>1</sup>

5 In rendering its decision, the Board considered the following submittals:

- 6 1. Respondent Ecology's Motion for Summary Judgment on Issue No. 3.
- 7 2. Declaration of Daylin Davidson with attached exhibits.
- 8 3. Response to Ecology's Motion for Summary Judgment on Issue No. 3 (Dated July  
9 26, 2006) with attached exhibits.
- 10 4. Ecology's Reply to Response to Ecology's Motion for Summary Judgment on  
11 Issue No. 3.
- 12 5. Declaration of David Misko with attached exhibits.

13 Having fully considered the record in this case and being fully advised, the Board enters  
14 the following ruling:

### 15 DISCUSSION

16 The issue before the Board in this motion is whether the filing of an Application for  
17 Relief with Ecology for the potential mitigation of a penalty also affects the time period for filing  
18 an appeal of an administrative order with the Board when the administrative order is based upon  
19 the same set of facts as the penalty. The Board answers this question in the negative and grants  
20 Partial Summary Judgment to Ecology on this issue.

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21 <sup>1</sup> The presiding officer agrees with Ecology's position that the Pre-hearing Order  
established only a single response to motions, and no request to modify the briefing schedule for exigent or  
exceptional circumstances was made. It is therefore appropriate to strike the second response from Argent Labs.

1 FACTUAL BACKGROUND

2 [1]

3 Ecology conducted a compliance inspection at Argent Labs on May 19, 2005, in response  
4 to a complaint. Ecology observed several violations of the hazardous waste laws while at the  
5 site. *Declaration of Davidson*. Ecology issued Administrative Order No. 2768 (administrative  
6 order) and Notice of Penalty Incurred and Due No. 2769 (penalty) as separate documents to  
7 Argent Labs on February 28, 2006. Both the administrative order and penalty were sent by  
8 certified mail and were received by Argent on March 1, 2006.

9 [2]

10 Argent Labs filed an Application for Relief of the penalty with Ecology on March 28,  
11 2006. *Argent Labs First Response, Ex. 2*. Argent Labs filed its appeal of the penalty and  
12 administrative order with the Board on May 4, 2006. The order was appealed to the Board sixty-  
13 four (64) days after it was received by the Appellant.

14 ANALYSIS

15 [3]

16 Summary judgment is a procedure available to avoid unnecessary trials where formal  
17 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the  
18 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152 (1977). The summary  
19 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

20 The party moving for summary judgment must show there are no genuine issues of  
21 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*

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1 *Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182, 930 P. 2d 307 (1997). A material fact in a  
2 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*  
3 *Denver*, 118 Wn. 2d 451, 456, 824 P. 2d 1207 (1992). If the moving party satisfies its burden,  
4 then the non-moving party must present evidence demonstrating material facts are in dispute.  
5 *Atherton Condo Ass'n v. Blume Dev. Co.* 115 Wn. 2d 506, 516, 799 P.2d 250 (1990),  
6 *reconsideration denied* (1991). Summary judgment may also be granted to the non-moving  
7 party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357,  
8 365, 842 P.2d 470 (1992). There are no material facts in dispute, which are necessary to resolve  
9 this matter. Therefore summary judgment is appropriate.

10 [4]

11 The notice of penalty served on the Appellant contained clear language informing the  
12 Appellant of its appeal rights related to the penalty. The notice informed the Appellant of the  
13 right to either submit an Application for Relief from an assessed penalty to Ecology, or to file an  
14 appeal immediately with the Board. The notice further informed Appellant that failure to do  
15 either in a timely fashion made the penalty due and owing without further review. Under this  
16 appeal process, if the Appellant filed an Application for Relief with Ecology, the agency must  
17 issue a Notice of Disposition upon Application for Relief. The Notice of Disposition upon  
18 Application for Relief is then appealable to the Board. *Declaration of Davidson, Attachment B,*  
19 *p.8.*

1 [5]

2 The mitigation language in the notice of penalty is consistent with the provisions of RCW  
3 43.21B.300. This statute allows a party issued a penalty to request remission or mitigation of the  
4 penalty by Ecology within 30 days of receipt of the penalty. RCW 43.21B.300 (1). After receipt  
5 of Ecology's Notice of Disposition upon Application for Relief, a party has 30 days to appeal the  
6 decision regarding the penalty to the Board. RCW 43.21B.300 (2).

7 [6]

8 The right to appeal an administrative order, and the process involved in such an appeal,  
9 differs from an appeal of a penalty. RCW 43.21B.310 (1) requires appeals of administrative  
10 orders to be filed directly with the Board within 30 days of their receipt. There is no option to  
11 appeal the order administratively to Ecology, and nothing in this statute creates an automatic stay  
12 of an administrative order while mitigation or remission of a penalty is under consideration.  
13 RCW 43.21B.310 (3) specifies that a stay of an order is obtained by applying with the Board  
14 pursuant to the process established in RCW 43.21B.320. Consistent with these legal  
15 requirements, the administrative order directed at Argent Labs does not contain language similar  
16 to the language in the application for relief (which allows appeals to be filed with the Board *after*  
17 the notice of disposition is rendered by Ecology). Instead, the administrative order informs the  
18 Appellant of the right to appeal to the Board within 30 days of its receipt. *Declaration of*  
19 *Davidson, Attachment A, p. 10.*

1 [7]

2 It is important to note that the administrative order in question contains the following  
3 notice: “Your appeal alone will not stay the effectiveness of this Order. Stay requests must be  
4 submitted in accordance with RCW 43.21B.320.” The Board finds that Argent Labs was fully  
5 informed of its right to appeal the administrative order and the applicable time period in which  
6 the appeal was to be filed with the Board.

7 [8]

8 WAC 371-08-335(1) states “for the Board to acquire jurisdiction . . . filing must be  
9 timely accomplished.” The Board lacks jurisdiction to consider an appeal that is not filed within  
10 the time period prescribed by statute. RCW 43.21B.310 (1) requires the appeal of an  
11 administrative order to be filed with the Board within 30 days of its receipt. Here the appeal of  
12 the Administrative Order was filed 64 days after its receipt. Therefore, the Board lacks  
13 jurisdiction over this untimely appeal of Administrative Order No. 2768. *Baker Commodities v.*  
14 *Spokane County Air Pollution Control Authority*, PCHB No. 03-015 (Order Granting Summary  
15 Judgment) (June 27, 2003). *See also Ahtanum General Store v. Ecology*, PCHB No. 05-106  
16 (Order Granting Summary Judgment) (February 3, 2006); *Thomas v. Yakima Regional Clean Air*  
17 *Authority*, PCHB No. 02-047 (Order Granting Motion to Dismiss for Lack of Jurisdiction)  
18 (2002).

19 [9]

20 In an analogous case before the Forest Practices Appeals Board (FPAB), the FPAB  
21 determined that an appeal of two “Notices to Comply” did not provide that Board with  
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jurisdiction over a civil penalty issued out of the same underlying facts when the penalty was not timely appealed to the Board and no request for remission or mitigation was made. In affirming the FPAB, the Court of Appeals noted that the plain language of the statutes granted the Department of Natural Resources separate authority to issue both Notices to Comply and penalties. The Court of Appeals held that the dismissal of the appeal for lack of jurisdiction was appropriate because the Legislature set forth separate methods for appealing enforcement mechanisms from civil penalties. *Johnson Forestry Contracting v. Department of Natural Resources*, 131 Wash. App. 13, 126 P.3d 45 (2006).

[10]

The Legislature could have chosen to enact language providing parties relief from administrative orders by creating an automatic stay pending the outcome of a mitigation determination of a related civil penalty, but it has not done so.

Based on the foregoing analysis, the Board enters the following

#### ORDER

IT IS ORDERED that:

1. The Motion for Partial Summary Judgment is GRANTED in favor of Ecology.
2. The remaining issue will be decided at the hearing on the merits.

Done this 31<sup>st</sup> day of August 2006.

**POLLUTION CONTROL HEARINGS BOARD**

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William H. Lynch, Presiding  
Kathleen D. Mix, Member  
Andrea McNamara Doyle, Member